FILED
DEC 10 19
MICHAEL RODAK, JR.,

75-825

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1975

SYLVESTER J. CAMPBELL,
Petitioner

VS.

HON. MILTON J. SHAPP,
GOVERNOR OF PENNSYLVANIA
and KENNETH G. BIEHN,
DISTRICT ATTORNEY OF
BUCKS COUNTY, and SHERIFF
OF BUCKS COUNTY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SYLVESTER J. CAMPBELL, :
Petitioner

:

VS.

: IN THE SUPREME
HON. MILTON J. SHAPP, : COURT OF THE
GOVERNOR OF PENNSYLVANIA : UNITED STATES
and KENNETH G. BIEGN,
DISTRICT ATTORNEY OF :
BUCKS COUNTY, and SHERIFF
OF BUCKS COUNTY :

PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE ORDER OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, CASE NO. 75-1226

1. Copies of the opinion of the Court of Appeals in the United States District Court are contained in the Appendix.

2. Jurisdiction

a) The date of the judgment sought to be reviewed is September 11, 1975.

b) This Honorable Court has jurisdiction over this federal question under the due process law of the fifth amendment to the constitutional provision for extradition and under

28 U.S.C. Section 2241.

3. Questions presented for review

a) Whether the district court and the Court of Appeals erred in not granting the Writ of Habeas Corpus to correct an abuse of the extradition process constituting a violation of due process where the purpose of the extradition request is not for the purpose of having petitioner stand trial for the crimes charged in the indictments issued by the demanding state, but rather to gain control of the person of the petitioner in the demanding state in order to subject him to processes of law for which he could not and was not extradicted, to wit: to compel him to appear before a legislative or executive committee or other tribunal in connection with matters not related to the indictments.

b) Whether the District Court of Appeals erred in not requiring or allowing an evidentiary hearing to be held on the question of the abuse on the extradition proceeding.

c) Whether the District Court and the Court of Appeals erred in not allowing Petitioner to utilize discovery to prove the abuse of the extradition proceeding.

d) Whether the District Court and Court of Appeals erred in determining that petitioner was a fugitive within the meaning of the Constitution and the extradition statute.

e) Whether the District Court and Court of Appeals erred in failing to determine whether the indictment failed to state an offense or was void as violative of due process under the Constitution.

4. Constitutional provisions and statutes which the case involves:

a) Article 4 Section 2 of U.S. Constitution:

> "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority from the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

b) Amendment 5 to the Constitution of the United States:

> "No person shall. . . be deprived of life, liberty, or property without due process of law. . . ."

c) 19 Pa. Statute Sec. 191.3

5. Statement of the Case.

Petitioner was indicted by an Essex County, New Jersey grand jury for three charges arising out of allegations that in Newark, New Jersey he submitted a false transcript, under oath, evidencing that he was a graduate of Delaware

University, as part of an application for a New Jersey engineering license. The indictments set forth that the first crime was committed on April 30, 1970, the second between April 30, 1970 and February 17, 1971, and the third between October 28, 1970 and February 17, 1971.

On March 27, 1973, a request was made for rendition by the State of New Jersey to the Commonwealth of Pennsylvania. Petitioner resides in Pennsylvania, and has his business in Pennsylvania. A warrant was issued by Pennsylvania, and petitioner was arrested pursuant to that warrant. Petitioner applied for habeas corpus to the courts of Pennsylvania, and relief was denied. He appealed the decision to the Superior Court of Pennsylvania, which affirmed, and petitioned for review to the Supreme

Court, which denied review.

He then sought habeas corpus relief in the U. S. District Court for the Eastern District of Pennsylvania, which refused to conduct an evidentiary hearing or allow discovery, and which denied relief. See Exhibit A. An appeal was taken to the U.S. Court of Appeals for the Third Circuit, which affirmed the decision of the District Court. Exhibit B.

Petitioner averred in his petition for habeas corpus before the District Court that the State of New Jersey was seeking his extradition, not for the purpose of trying him on the indictments, but for the purpose of bringing him into New Jersey to subject him to legal process and compulsion for the purpose

of bringing him before legislative or executive committees or other tribunals to compel him to testify on matters not related to the charges in the indictment. It was averred that this was a violation of the extradition clause of the Constitution and a violation of due process of law. Although petitioner requested an evidentiary hearing to prove the averment, no hearing was ever allowed.

Petitioner had raised the same issue in the state court in his petition for allocatur. or petition for review, to the state Supreme Court. Petitioner had not raised the issue in the state trial court and no evidentiary hearing

was ever had on this issue in the state courts.

In the state court proceedings petitioner stipulated that he had been within the state of New Jersey on unrelated business on dates within the time period stated in the second and third indictments, but had not been in New Jersey on any date specifically listed in the indictments.

6. JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had jurisdiction under 28 U.S.C. 2241 Constitution; Amendment V, U.S. Constitution. See Sokol, Federal Habeas Corpus, § 4.2C, page 45 (2d Rev. Ed. 1969).

7. ARGUMENT

I. The District Court erred in not granting the writ of Habeas Corpus

to correct an abuse of the extradi-process.

A prisoner, in testing the legality of extradition proceedings through habeas corpus, may test the motivation or purpose of the extradition, to insure that the extradition for a criminal charge is not a pretext to remove him to another jurisdiction for a purpose other than that within the intendment of the Constitution and applicable statutes. Commonwealth ex rel. Spivack v. Heinz, 141 Pa. Super. 158, 14 A.2d 875 (1940); Chatham v. State, 248 So. 2d 768 (Ala. Cr. App. 1971); see also Kerr v. Illinois, 119 U.S. 436 (1886); cf. Holiday vs. Johnston, 313 U.S. 342, 351 (1951); Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886); Walker v. Johnson, 312 U.S. 275, 285

(1941); United States v. Falk, 479 F.2d 616 (7th Cir. 1973); Kostic v. Smedley, 15 Cr. L. 2213 (Alaska, May 10, 1974.

II. The District Court erred in not holding an evidentiary hearing.

A petitioner seeking to establish the illegality of his detention for extradition may be permitted to prove the facts which establish the illegality of his detention at a hearing conducted a part of the habeas corpus proceeding. Holiday v. Johnston, 313 U.S. 342, 351, (1941); Peyton v. Rowe, 391 U.S. 54, 58 (1968); Walker v. Johnson, 312 U.S. 275, 285

(1941) ("If an issue of fact is presented the practice appears to have been to . . . hold a hearing at which the evidence is received. This is, we think, the only admissible procedure.").

District Court erred in determining that petitioner was held under state custody within the meaning of 28 U.S.C. Section 2241 (c) (2). One leading commentator has stated "The sounder view is that extradition falls under Section 2241 (c) (1)." Sokol, Fed. Habeas Corpus, Sec. 4.2 P. 46 (2nd Rev. Ed. 1969). See also ex parte Joseph Smith, the Mormon Prophet, 3 McLean 121 (1842); Kentucky vs. Dennison, 65 U.S. (24 HOW) 66 (1860). The act of returning a prisoner from the asylum state to the demanding

state is done under the sovereignty of the United States. 366 (1872). The state and Federal Courts possess concurrent jurisdiction and Habeas Corpus extradtition proceedings. See U.S. ex rel Darcy vs. Superintendent of County prisons, 111 F.2d 309 (3rd cir. 1940), cert. denied, 311 U.S. 662. Accordingly a de novo hearing was required in the District Court.

III. The District Court erred in denying petitioner discovery.

The Federal courts may utilize discovery procedures to determine the factual issue of denial of due process of law and the abuse or misuse of the extradition procedure. Harris v. Nelson, 394 U.S. 286 (1969).

IV. The District Court erred in

finding that petitioner was a fugitive subject to extradition.

One of the elements required for extradition is that the subject must have been present in the demanding state at the time of the commission of the crime. Hyatt vs. New York, 188 U.S. 691 (1903). Herein, the use of an expanded period of time by the use of broad date brackets is a subterfuge to cover petitioner's casual business trips to New Jersey. This practice must be considered a mere avoidance of the requirements of Hyatt, and the rule, to avoid this problem, should require that presence was on a date where an alleged act in furtherance of the crime took place.

V. The District Court erred in finding that the indictment stated an offense.

In an extradition habeas corpus proceeding the court must look to see if the indictment states an offense. Burke v. State, 265 A.2d 489 (Me. 1970); Commonwealth ex rel. Kelly v. Santo, 436 Pa. 204, 259 A.2d 456 (1969). Where the indictments aver that the crime took place over a broad time span they violate due process of law, and do not state an offense.

WHEREFORE, Petitioner prays that this Honorable Court grant this Petition for Writ of Certiorari.

HARVEY L. ANDERSON, ESQ.

75-8251

Supreme Court, U. S.
FILED
DEC 18 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1975

SYLVESTER J. CAMPBELL,
Petitioner

VS.

HON. MILTON J. SHAPP,
GOVERNOR OF PENNSYLVANIA
and KENNETH G. BIEHN,
DISTRICT ATTORNEY OF
BUCKS COUNTY, and SHERIFF
OF BUCKS COUNTY

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1226

SYLVESTER J. CAMPBELL,

Appellant,

v.

HONORABLE MILTON J. SHAPP, GOVERNOR OF PENNSYLVANIA, and KENNETH G. BIEHN, DISTRICT ATTORNEY OF BUCKS COUNTY, and SHERIFF OF BUCKS COUNTY

Appeal from the United States District Court for the Eastern District of Pennsylvania.

(D.C. Civil Action No.74-2140)

Argued September 11, 1975

Before: ALDISERT, GIBBONS and WEIS, Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the district court erred (1) in not granting the writ of habeas corpus to correct an abuse of the extradition process constituting a violation of Due Process; (2) in not holding an

evidentiary hearing; (3) in not allowing appellant discovery; (4) in finding appellant was a fugitive subject to extradition; and (5) in finding that the indictment under which appellant was charged stated an offense, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

_____
CIRCUIT JUDGE

Certified as a true copy and issued in lieu of a formal mandate on October 3, 1975.

Test: Thomas F. Quinn

Clerk, United States Court of Appeals for the Third Circuit

ATTEST:

_____
Thomas F. Quinn, Clerk
DATED SEP. 11, 1975

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVESTER J. CAMPBELL	:	CIVIL ACTION
V.	:	
HON. MILTON J. SHAPP, Governor of Pennsylvania and KENNETH G. BIEHN, District Attorney of Bucks County, and SHERIFF of Bucks County	:	NO. 74-2140

MEMORANDUM AND ORDER

Newcomer, J. November 22, 1974.

The petitioner, Sylvester Campbell, is the subject of a demand for extradition made by the Governor of New Jersey and a warrant honoring that demand issued by the Governor of Pennsylvania pursuant to § 7 of the Uniform Extradition Act.[1] Petit oner obtained a writ of habeas corpus from a state court, but this writ was dissolved by the court after a series of evidentiary

hearings and petitioner was ordered to be extradited. His appeals in the state courts proving unsuccessful, Campbell brought a writ of habeas corpus in this Court. Campbell argues that the authorities seeking his extradition[2] have the burden of showing that he was present in the demanding state at the time of the commission of the crime upon which the extradition demand is based, and that even if he admits that he was present in New Jersey on certain dates that fall within the time periods marked out in the indictment charging him, the authorities must showconnection between petitioner's presence and the crime charged where, as here, the indictment does not give specific dates but recounts that a crime was committed within a definite but extended time period. Campbell also maintains that his indictment merely a pretext and that New Jersey is really seeking him in order to use him as a witness against his will. For the reasons discussed below, we reject these contentions and dismiss petitioner's writ.

Two preliminary questions must be dealt with before we can discuss the merits of this matter. First, respondent argues that petitioner cannot apply for a writ of habeas corpus because he is not in custody, having been released on bond pending extradition proceedings within the courts of Pennsylvania. We believe that the custody question has been resolved in petitioner's favor by the case of Hensley v. Municipal Court, 411 U.S. 345 (1973). Second, Campbell contends tha this Court should hold an

evidentary hearing on the facts of his case even though a hearing has already been held by the state court. We find that even though the state and federal courts have concurrent jurisdiction over habeas corpus in extradition matters,[3] a petitioner must show that his case falls within one of the subsections of 28 U.S.C. §§ 2254 (d) [4] before he is entitled to a hearing de novo, and we are satisfied from a reading of the state court record that none is required. We therefore accept the factual findings of the state judge as correct. Smith v. State of Idaho, 253 F. Supp. 228 (D.C. Idaho 1966).

The process of extraditing an accused who has fled to another state is set forth in the United States Constitution, Article 4, Section 2, clause 2:

> "A person charged in any state with treason, felony, or other crime who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

This section has been implemented by a federal statute, 18, U.S. C. §§ 3182, and, in Pennsylvania, by the Uniform Extradition Act, 19 P.S. 191.1 et seq. Before an accused can be extradited under either statute, the following must be shown:

(i) that the subject of extradition is charged with a crime in the demanding state;

(ii) that the subject of the extradition is a fugitive from the demanding state;

(iii) that the subject of the extradition was present in the demanding state at the time the crime was committed;

iv) that the requisition papers are in Order. Commonwealth ex rel. Devault v. Kovach, 439 Pa. 96 (1970).

The state Judge found that Campbell was charged with a crime in New Jersey, that he was a fugitive from the state, and that the requisition papers were in proper order. The Judge also found that petitioner was in the state of New Jersey on various dates during which the indictment alleges the crime was committed. Thus the only question remaining[5] is the legal one of whether the Judge's finding that the state presented sufficient evidence to show that petitioner's presence at the time the alleged crimes were committed was correct.

The first count of the indictment states that petitioner committed the o fense of swearing a false oath on April 30, 1970. The subsequent wo counts allege that petitioner committed the offenses of obtaining money by false pretense and uttering forged instruments "between, on or about the 30th day of April, and on or about the 17th day of February, 1971". The indictment itself constitutes a prima facie case for the state; however, the state court was further benefited by a stipulation entered into between the state and petitioner. According to this stipulation, petitioner was physically present in New Jersey on twenty-three distinct and separate dates between June 1, 1970 and February 17, 1971.

Petitioner argues that Hyatt v. New York, 188 U.S. 691 (1903) and In Re Gibson, 147 F. Supp. 591 (D.C. 1957) compel a showing that petitioner was in New Jersey on the specific date upon which the crime was supposedly committed. In Hyatt the Supreme Court

refused to allow extradition where the state conceded that the petitioner therein was not in the state at the various times when it was alleged in the indictment the crimes were committed; in fact, it was admitted that he was not present in the demanding state until eight days after the last offense was alleged to have been committed. The Court stated:

> "That the prosecution on the trial of such an indictment need not prove with exactness the commission of the crime at the very time alleged in the indictment is immaterial. The indictments in this case named certain dates as the times when the crimes were committed, and where. . . there is no proff, or offer of proof, to show that the crimes were in truth committed on some othe day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the state at the times named in the indictment. . . the facts so proved are sufficient to show that the person was not in the state when the crimes were, if ever committed." 188 U.S. 711-12 (emphasis supplied).

In Gibson a district court granted a habeas writ where the indictment states that the subject of extradition committed an offense on "February __, 1946." The court found the indictment insufficient proof that the petitioner had been present in the state at the time of the offense.

These cases stand for the proposition that the evidence must show that the subject of the extradition demand was present in the demanding state at the times stated in the indictment; they do not establish the proposition that the indictments must set forth specific dates. The second and third counts of the

indictment naming Campbell state that the offenses were committed within a certain time period; the facts as stipulated to demonstrate that petitioner was in New Jersey within that time period. (Conversely, the stipulated facts demonstrate that petitioner was not present on the date specified in the first count). The governor has thus met the requirements of Hyatt and Gibson.

Petitioner argues that even if the indictment is sufficient to show presence, the wide span between the dates specified in the second and third counts violates due process. However, in order to determine the validity of this constitutional claim, this court would in effect be trying petitioner's case, something which it is forbidden to do by the overwhelming weight of authority.[6] Ex parte Birdseye, 246 U.S. 657 (1918); Smith v. Gross, 2 F.2d 507, (5th Cir.), cert. den. 267 U.S. 610 (1924); In Re Bloch, 87 F.981 (D.C. Ark. 1898). Petitioner is free to raise this or any other defense in the New Jersey courts.

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

SYLVESTER J. CAMPBELL	:	CIVIL ACTION
V.	:	
HON. MILTON J. SHAPP, Governor of Pennsylvania, and KENNETH G. BIEHN, District Attorney of Bucks County, and SHERIFF of Bucks County	:	NO. 74-2140

ORDER

AND NOW, to wit, this 22nd day of November, 1974, the Court having considered the record of the proceedings in the Commonwealth Courts and the briefs of the parties, the petition of Sylvester J. Campbell for a writ of habeas corpus is hereby DENIED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

FOOTNOTES

[1]19 P.S. 191.1 et seq. (1941)

[2]Petitioner's habeas corpus writ was brought against the Governor of Pennsylvania in both state and federal court. However, in the second evidentiary hearing in state court, the case against petitioner was conducted principally by the Deputy Attorney General of New Jersey.

[3]United States v. Superintendent of County Prisons, 111 F.2d 409, (3rd Cir. 1940).

[4]. § 2254 (d) states:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person is custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a facutal issue, made by a State Court of competent jurisdiction in a

proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State Court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;

or

(7) that the applicant was otherwise denied due process of law in the state court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of the

sufficiency of the evidence to support suph factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentary hearing in the proceeding in the Federal Court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

[5]Petitioner has alleged that the motive of the New Jersey Executive in indicting him and seeking his extradition was not to obtain his conviction but to secure him as a witness in a criminal investigation. This issue was not raised below, but it would nevertheless be improper for us to consider this contention since a court on habeas corpus may not inquire into the motive behind the extradition demand. United States v. Superintendent of County Prisons, 111 F.2d 409 (3rd Cir. 1940).

[6]It would also be premature for this Court to rule on the constitutional validitv of the indictment, since any vagueness could possibly be cured by a bill of particulars or discovery on defendant's part.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVESTER J. CAMPBELL	:	CIVIL ACTION
V.	:	
HON. MILTON J. SHAPP, Governor of Pennsylvania, and KENNETH G. BIEHN, District Attorney of Bucks County, and SHERIFF of Bucks County	:	NO.74-2140

ORDER

AND NOW, to wit, this 22nd day of November, 1974, the Court having considered the record of the proceedings in the Commonwealth Courts and the brief of the parties, the petition of Sylvester J. Campbell for a writ of habeas corpus is hereby DENIED.

AND IT IS SO ORDERED.

CLARENCE C. NEWCOMER, J.

Supreme Court, U. S.
FILED
JAN 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-825

SYLVESTER J. CAMPBELL, *Petitioner*

v.

HONORABLE MILTON J. SHAPP, Governor of Pennsylvania, and KENNETH G. BIEHN, District Attorney of Bucks County and Sheriff of Bucks County, *Respondents*

Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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STATEMENT OF THE CASE

The State of New Jersey is seeking the extradition of the petitioner pursuant to the provisions of the Uniform Extradition Act, the Act of July 8, 1941, P.L. 288, Section 1, et seq., 19 P.S. §191.1, et seq. The Governor of Pennsylvania has issued a warrant for the arrest as required by Section 7 of the Act following his receipt of the demand from the Governor of New Jersey. It was duly executed and sealed by the State of New Jersey as required by Section 3 of the Act. The petitioner petitioned the Court of Common Pleas of Bucks County, Commonwealth of Pennsylvania, for a writ of habeas corpus, pursuant to Section 10 of the Act. Several hearings were held before the Honorable Isaac S. Garb pursuant to that petition, and on January 3, 1974, Judge Garb discharged the writ and ordered the extradition of the petitioner to New Jersey. Thereafter, the petitioner filed an appeal to the Superior Court of Pennsylvania, which court, after argument, affirmed the decision of the court below. A petition for allowance of appeal from the Superior Court to the Supreme Court was thereafter filed. The Supreme Court of Pennsylvania denied the petition on August 8, 1974.

Thereafter, the petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. On August 18, 1974, in consideration of the petition for a writ of habeas corpus, the respondents were ordered to show cause why the petition should not be granted. A hearing was set for September 6, 1974, before the Honorable Clarence C. Newcomber. Judge Newcomber, after argument by the respective parties, and upon consideration of briefs submitted by the parties, denied the petitioner's writ of habeas corpus on November 22, 1974. Thereafter, the instant appeal to the Third Circuit Court of Appeals followed.

Judge Newcomber neither granted nor denied a certificate of probable cause. Thereafter, Thomas F. Quinn, Clerk

of the United States Court of Appeals, submitted a request for such a certificate on Mr. Campbell's behalf to the Court of Appeals on February 24, 1975. On March 6, 1975, the motion for a certificate of probable cause was denied, and the court noted that a petitioner may be entitled to appeal under 28 U.S.C. §2241 (c) (1). The latter citation was later amended to 28 U.S.C. §2241 (c) (3).

Thereafter, petitioner filed an appeal with the United States Court of Appeals which was argued on September 11, 1975. On the same day, the appeal was denied and the order of the District Court was affirmed.

REASONS FOR DENYING THE WRIT

Initially, the Supreme Court of the United States should deny this instant petition for a writ of certiorari because the Court of Appeals improperly permitted the petitioner's appeal.

Admittedly a federal question is raised. Extradition between states is required by Article 4, Section 2 of the Constitution. Thus, an individual in custody of state officials, as is petitioner, is thereby being held under color of authority derived from the Constitution of the United States and he may test the propriety of his extradition in the federal courts. The federal court review is by habeas corpus. 28 U.S.C. §2241 (c).

The petitioner sought habeas corpus review in the District Court; however, the writ was denied. After the denial of his writ by the District Court, he appealed to the Third Circuit Court of Appeals. The rules are clear, however, that before he could appeal, he should have had a certificate of probable cause. F.R.A.P. 22 provides in relevant part as follows:

> (b) NECESSITY OF CERTIFICATE OF PROBABLE CAUSE FOR APPEAL in a Habeas Corpus proceeding, in which the detention complained of arises out of process issued by State Court, an Appeal by the Applicant for the Writ may not proceed unless a District Court or a Circuit Court issues a Certificate of Probable Cause. . . ."

This rule is based on 28 U.S.C. §2253, which provides that an appeal may not be taken in a habeas corpus proceeding where confinement is under the judgment of a state court unless the judge who rendered the order in the habeas corpus proceeding, or a circuit court judge, issues a certificate of probable cause. While 28 U.S.C. §2253 does not authorize a court of appeals as a court to grant a certificate

of probable cause, *In re Burwell*, 350 U.S. 521 (1956) makes it clear that a court of appeals may not decline to consider a request for a certificate addressed to the court as a whole and must regard the request as made the judges thereof.

Judge Newcomber failed to consider whether a certificate of probable cause should issue; therefore, the Third Circuit considered that issue and denied the certificate. Without the certificate, the Third Circuit Court of Appeals did not have jurisdiction to hear the petitioner's appeal. See *Hooks v. 4th District Court of Appeals* (5th Cir., 1971) 442 F.2d 1042.

The rule is specific: "An appeal by the applicant for a Writ *may not proceed* unless a district court or a circuit court judge issues a certificate of probable cause." No certificate is issued in the instant case, and therefore, the appeal was improvidently granted and this petition for a writ of certiorari from that Order of that Court should be denied.

The remaining reasons for denying the writ are included in the alternative, in the event this Court determines that the matter was properly before the Third Circuit Court of Appeals.

A. When the demanding state has complied with the legal requirements for extradition, the court does not have the power to inquire into the motives of the prosecution or whether the charge is true.

The court of an asylum state will order extradition when the following elements are found to be present:

a. The subject of the extradition is charged with a crime in the demanding state;

b. The subject of the extradition is a fugitive from the demanding state;

c. The subject of the extradition was present in the demanding state at the time of the commission of the crime; and

d. the Requisition papers are in order.

Ripepi Extradition Case, 427 Pa. 507 (1967); *Commonwealth ex rel. Banks v. Hendrick*, 430 Pa. 575 (1968); and *Commonwealth ex rel. Coades v. Gable*, 437 Pa. 553 (1970).

The extradition warrant is *prima facie* evidence of the existence of every fact which the executive authority was obliged to determine before issuing it. The burden was upon the petitioner to come forward with evidence to overcome the *prima facie* case of the validity of the warrant upon its introduction. *Taylor v. Superintendent, Philadelphia County Prison*, 382 Pa. 181 (1955). The signed and sealed demand of the Governor of New Jersey, together with a certified copy of the indictment and a signed and sealed warrant for the petitioner's request signed by the Governor of Pennsylvania, were offered into evidence and were received without objection. The demand from the Governor from the State of New Jersey recites that the petitioner was present in the state of New Jersey at the time of the commission of the alleged crime, since the petitioner offered no evidence to overcome the allegation, it must stand. Furthermore, the evidence presented at the hearing on this extradition supported these facts.

The petitioner in both the state court and the district court made a number of unsubstantiated allegations that New Jersey was attempting to extradite the petitioner for an improper purpose, *i.e.* to coerce him into being a witness before the Grand Jury.

However, the very cases cited by the petitioner in his brief established that he may not question the motives for the prosecution until he arrives in New Jersey. For example, in *Commonwealth ex rel. Spivack v Heinz*, 141 Pa. Super. 158, 14 A.2d 875 (1940) the court held:

"In approaching a discussion of the question before us, we recognize that it is the duty of the Commonwealth to aid in the punishment of crime committed in another state by the prompt extradition of a fugitive of justice found within its jurisdiction. If the demanding state has complied with the legal requirements, neither our Governor nor this court has the power to inquire into the motives of the prosecution or whether the charge is true."

Petitioner has been properly charged with a crime and indicted in the state of New Jersey. He is, therefore, a fugitive from the demanding state and as will be argued below, he was present in the demanding state at the time of extradition. And since the requisition papers are in order, the petitioner must be extradited.

B. The petitioner was not entitled to a hearing in the federal court on his request for a petition for habeas corpus after he had a full and adequate hearing before the state court.

The petitioner in the court below contended that he was entitled to a hearing before the District Court to review the State's denial of his petition for a writ of habeas corpus. The Commonwealth contended on the other hand, that the federal court is limited to reviewing the state record to determine whether on the face of the record the court's order for extradition was justified. The Commonwealth contended further that the state court's order of extradition should be reversed only if the federal court were to conclude that there had been an abuse of discretion by the state court.

The Commonwealth does not disagree that the petitioner must be given due process of law when he is extradited. In the instant case, he has had a full hearing and the order of the trial court has been reviewed by the appellate courts of the state and affirmed. As such petitioner has

certainly been given due process of law. The Commonwealth asserts that for the reasons set out below, due process did not require another hearing before the federal courts and that, therefore, no probable cause for another hearing exists.

The federal courts have frequently had to decide the issue of when the appellant who is challenging a state extradition order will be permitted to offer evidence before the federal court. See *Smith v. Idaho*, 373 F.2d (1967); *Townsend v. Sain*, 372 U.S. 293, 9 L. Ed. 2d 770 (1963). *Townsend* sets forth six circumstances where the federal court should grant an evidentiary hearing to a habeas corpus applicant:

"If (1) the merits of the factual dispute were not resolved in the State Hearing; (2) the State factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed by the State Court was not adequate to afford a full and thorough hearing; (4) there is a substantial allegation of newly discovered evidence; (5) material facts were not adequately developed at the State Court hearing; or (6) for any reason it appears that the State trier of fact did not afford the Habeas applicant a full and fair hearing." 372 U.S. at 313.

In the absence of one of the aforementioned circumstances, a separate hearing is not required. In his petition for a writ of habeas corpus, the applicant did not allege any of the six standards set forth in *Townsend*. Rather, petitioner sought to raise for a second time all of the issues that he had earlier raised in the state court. A full and factual hearing was held on these issues and a thorough review of them was made by the state court. The findings of the state trial court were then reviewed by the state appellate courts and found to be supported by the facts. As such, the petitioner has alleged no facts which will

entitle him to another evidentiary hearing before the District Court and therefore, the federal court is merely charged with the responsibility to review the state court's finding and if it is supported by the record, to affirm it.

Furthermore, as Judge Newcomber properly concluded in his memorandum and order at footnote 5, there was no need to hold an evidentiary hearing on the motive behind the extradition because as was noted above, motive may not be inquired into on habeas corpus review. Judge Newcomber observed:

> "Petitioner has alleged that the motive of the New Jersey executive in indicting him and seeking his extradition was not to obtain his conviction, but to secure him as a witness in a criminal investigation. The issue was not raised below, but it would nevertheless be improper for us to consider this contention since a Court on Habeas Corpus may not inquire into the motive behind the extradition demand. *United States vs. Superintendent of County Prisons*, 111 F.2d 409 (3rd Cir. 1940). Furthermore, the issue of improper motive had been raised by appellant in argument before the Superior Court of Pennsylvania and in his Petition for Allowance of Appeal to the Supreme Court of Pennsylvania and was rejected by both courts as being without foundation."

The issues raised by the petitioner are not novel. They fall squarely under the precedents which have been handed down on numerous occasions by state and federal courts on the question of extradition.

C. The District Court did not err in denying the petitioner's motion for discovery where a review is merely limited to a review of the state court record.

The Commonwealth does not contend that discovery is not available in certain instances in the federal court.

However, where as here. the District Court was limited to merely reviewing the state court record in response to the writ of habeas corpus, there was no need for discovery, and therefore, the motion was properly denied.

D. Proof that the petitioner was in the demanding state at various times "between, on or about the 30th day of April and on or about the 17th day of February, 1971—the date specified in the indictments against the petitioner—established that the petitioner was "present in the demanding state at the time of the commission of the alleged crimes" and as required by the statute, was also a fugitive.

The State of New Jersey is seeking extradition of the petitioner pursuant to the provisions of the Uniform Extradition Act, the Act of July 8, 1941, P.L. 288, §1, et seq., 19 P.S. 191.1, et seq. The Governor of Pennsylvania has issued a warrant of arrest as required by §7 of the Act following his receipt of a demand from the Governor of New Jersey that was duly executed and sealed by the Statute of New Jersey as required by §3 of the Act. The petitioner then petitioned the Court of Common Pleas for a writ of habeas corpus which was issued by the court under the provisions of §10 of the Act. Several hearings were held before the Honorable Isaac S. Garb and on January 3, 1974, discharged the writ and ordered the extradition of the petitioner to New Jersey.

The courts of an asylum state will order extradition only if all four requirements of the statute are met: (1) The subject of the extradition is charged with a crime in the demanding state; (2) the subject of the extradition is a fugitive from the demanding state; (3) the subject of the extradition was present in the demanding state at the time of the commission of the crime (subject to the exception found in §6); (4) the requisition papers are in order. *Commonwealth ex rel. Devault v. Kovach*, 439

Pa. 96 (1970); *Commonwealth ex rel. Coades v. Gable*, 437 Pa. 553 (1970); *Commonwealth ex rel. Flood v. Pizzo*, 434 Pa. 208 (1969); *Commonwealth ex rel. Kelly v. Santo*, 436 Pa. 204 (1970).

The petitioner concedes that an indictment has been returned by the Grand Jury of the State of New Jersey charging him in three counts with the crimes of using a false oath, attempting to obtain a thing of value by means of false pretenses and uttering a forged document. He also admits that he is the person named in the indictment. Therefore, he concedes the first requirement of extradition, *i.e.*, that he is a fugitive from the demand state as that term is defined in *Commonwealth ex rel. Devault v. Kovach, supra.*

The petitioner, however, contends that he was not present in the demanding state at the time of the alleged crimes, as that phrase is defined in §§3 and/or 6 of the Act.

The extradition warrant is *prima facie* evidence of the existence of every fact which the executive authority was obliged to determine before issuing it. The burden was upon the petitioner to come forward with evidence to overcome the *prima facie* case of the validity of the warrant upon its introduction. *Taylor v. Superintendent, Philadelphia County Prison, supra.* The signed and sealed demand of the Governor of New Jersey, together with a certified copy of the indictment and a signed and sealed warrant for the petitioner's request signed by the Governor of Pennsylvania, were offered into evidence and received without objection. The demand from the Governor of the State of New Jersey recites that the petitioner was present in the State of New Jersey at the time of the commission of the alleged crime and since the petitioner offered no evidence to overcome the allegation, it must stand. Furthermore, the evidence presented at the hearings on this extradition support this fact.

The petitioner contends that the Commonwealth had the burden of proving that the appellant was present at

the time and place in the demanding state where "an alleged act in furtherance of the crime took place". (Petitioner's Brief, p. 13). However, there is nothing in the Act nor in the court decisions interpreting the Act which requires such proof. First, an examination of §3 reveals that the presence requirement is simply "that the accused was present in the demanding state at the time of the commission of the alleged crime". There is no requirement that the defendant be in a particular location in the state where the crime is alleged to have occurred, but merely that he was within the boundaries of the state. The evidence presented at the hearings, all submitted by stipulation, demonstrated that the petitioner was present in the State of New Jersey between July 1, 1970 and February 16, 1971, on 23 distinct and separate dates.

The petitioner argues that an indictment charging that a crime occurred between two separate days must fail because it is a "subterfuge, to cover petitioner's casual business trips to New Jersey." In order for the court to examine this allegation, however, the court would be required to make findings regarding the validity of the underlying charges against the petitioner in New Jersey. The District Court properly refused to make such findings. The courts of the asylum state may not inquire into the merits of the charges involved. Section 20 provides as follows:

> "The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor, or in any proceeding after the demand for extradition accompanied by a charge of a crime in legal form as above-provided shall have been presented to the Governor, except as it may be involved in identifying the person held as the person charged with the crime."

As has already been noted, the petitioner admits that he is the same person as the person charged with the crime.

In *Commonwealth ex rel. Coades v. Gable, supra,* the relator contended that there was not sufficient evidence to identify him as being the perpetrator of the alleged crime. The Supreme Court of Pennsylvania upheld the trial court which held that such evidence was irrelevant. The Pennsylvania Court concluded that it was not proper for the courts of the Commonwealth to examine the guilt or innocence of the person charged with a crime, but were merely required to determine that the person sought to be extradited was the same person as the person charged.

Judge Garb therefore properly concluded when he denied the writ filed in the state court:

> "We know of no case which distinguishes between a bill of indictment charging a crime on one specific date or one charging a continuing crime over a period of time. In either case, our sole inquiry in this regard is whether or not the relator is alleged to have been in a demanding state at the time of the commission of the alleged crime and prima facie validity must be afforded to that allegation; and if this fact is contested then a determination of whether the evidence presented at the habeas corpus hearing is sufficient to sustain that allegation. The evidence presented clearly shows that the relator was in the State of New Jersey on a number of occasions during the period of time during which the indictment alleges the crime was committed and this evidence is uncontradicted by relator. What his activities were on those dates, or what if any relationship those activities might have had to the alleged crime are substantive matters going to the charges contained in the bill of indictment themselves and are matters beyond our review at this time."

CONCLUSION

For the reasons stated above, the Commonwealth requests your Honorable Court to dismiss this petition for a writ of certiorari.

Respectfully submitted,

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